



August 6, 2002

Mr. Gary W. Smith
City Clerk
City of Baytown
P.O. Box 424
Baytown, Texas 77522-0424

OR2002-4330

Dear Mr. Smith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 166731.

The City of Baytown (the “city”) received a written request for, among other things, the “test results of counting machines” from the June 1, 2002 runoff election. You explain that the requestor is seeking the “Logic and Accuracy” tests of electronic tabulating equipment used during the tabulation of votes in the runoff election, as required under section 127.093 of the Election Code. You contend that the test results are excepted from required public disclosure pursuant to sections 552.101 and 552.103 of the Government Code. We assume the city has released the other requested information. If it has not, it must do so at this time. *See Gov’t Code §§ 552.301, .302.*

Section 552.101 of the Government Code protects “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” You first contend that the requested test results are made confidential under section 127.099 of the Election Code, which provides as follows:

- (a) On completing each test, the presiding judge shall place the test ballots and other test materials in a container provided for that purpose and seal the container so it cannot be opened without breaking the seal. The manager, tabulation supervisor, presiding judge, and not more than two watchers, if one or more watchers are present, shall sign the seal. The watchers must be of opposing interests if such watchers are present.

(b) The test materials shall remain sealed for the period for preserving the precinct election records.

(c) The container may not be unsealed unless the contents are necessary to conduct a test under this subchapter, a criminal investigation, election contest, or other official proceeding under this code. If the container is unsealed, the authority in charge of the proceeding shall resealed the contents when not in use.

You specifically contend that the requested test results are made confidential under section 127.099(c), which prohibits the unsealing of the container holding the test results except in certain circumstances not present here. Furthermore, section 127.099(b) specifies that the container must remain sealed for “the period for preserving the precinct election records.” Section 66.058(a) of the Election Code provides generally that the retention period for “precinct election records” is “60 days after election day.”¹ Because the city received the records request during the retention period established under section 127.099(b), we agree that the city acted properly in treating the requested test results as confidential and withholding those records from the public pursuant to section 552.101 of the Government Code.

This does not, however, end our discussion of whether the city may continue to withhold the test results from the requestor. In Open Records Decision No. 505 (1988), this office addressed whether voted ballots, which are included in the definition of “precinct election records,” that were similarly preserved in a sealed container pursuant to section 66.058(b) of the Election Code were confidential and thus must be withheld from the public pursuant to the statutory predecessor of section 552.101. *See* Elec. Code § 66.002 (defining “precinct election records”). In that decision, this office noted that section 1.013 of the Election Code permits, but does not require, the destruction of election records after the expiration of the prescribed retention period. The decision then went on to conclude that the statutory predecessor to section 552.101 of the Government Code applied “only to the extent that section 66.058 applies – during the retention period.” Open Records Decision No. 505 at 3. Thus, “any voted ballots retained by the custodian of election records after the prescribed retention period are subject to” required public disclosure under the Public Information Act.

After reviewing Open Records Decision No. 505 and the applicable law, we see no basis for treating the requested test results any differently from the voted ballots at issue in Open Records Decision No. 505. We therefore conclude that the “confidentiality” of the requested test results conferred by section 127.099(c) applies only as long as those records are required to be preserved in their sealed container: sixty days following the runoff election.

¹Section 66.058(g) provides, however, that the preservation period for “precinct election records in an election involving a federal office” is “at least 22 months after election day in accordance with federal law.”

Section 1.013 of the Election Code also permits, but does not require, the destruction of "other records that are preserved under" the Election Code such as the requested test results after the expiration of the prescribed retention period. On the other hand, chapter 202 of the Local Government Code also governs the "destruction and alienation" of "local governmental records." *See* Loc. Gov't Code § 201.003(8) (defining "local governmental record"). Section 202.002(b) of the Local Government Code provides as follows:

Regardless of any other provision of this subtitle or rules adopted under it, a local government record subject to a request under [the Public Information Act] may not be destroyed until the request is resolved.

Consequently, although the city is authorized to destroy the requested test results after the expiration of the retention period, it is prohibited from doing so until any previously received open records requests for the test results is resolved. *See also* Gov't Code § 552.001(b) (Public Information Act to be liberally construed in favor of granting request for information). Consequently, the current request for the test results, which was made during the retention period, must be treated as a request to inspect the test results when the retention period expires. *Cf.* Open Records Decision No. 505 at 4. Because we have determined that the requested test results do not remain confidential after the expiration of the retention period, and because those records may not be destroyed until the current request for those records is resolved, we must now determine whether the city may withhold the test results pursuant to the other exception you raised once the retention period has ended.

You contend that the city may withhold the requested test results pursuant to section 552.103 of the Government Code. To secure the protection of section 552.103, a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation to which the governmental body is a party. Open Records Decision No. 588 (1991). Additionally, the governmental body must demonstrate that the litigation was pending or reasonably anticipated as of the day it received the records request. Gov't Code § 552.103(c). The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 at 4 (1986). To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

After reviewing your brief to this office, we conclude that you have not met your burden of establishing that litigation against the city was pending or reasonably anticipated on the date the city received the records request. You have not informed us of any litigation currently pending against the city, nor have you informed us of any concrete steps an opposing party may have taken towards litigation prior to the date the city received the current records request. Accordingly, we conclude that the city must release the requested test results in their entirety once the retention period for those records has expired.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Cindy Nettles".

Cindy Nettles
Assistant Attorney General
Open Records Division

CMN/RWP/sdk

Ref: ID# 166731

Enc: Submitted documents

c: Mr. Mitchell Pearce
4704 Ripplecreek
Baytown, Texas 77521
(w/o enclosures)